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Public Prosecutor v Harmenderpall Singh a/l Jagara Singh

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–01–89 OF 2004
DENIS ONG, MOHD GHAZALI AND JAMES FOONG JJCA
7 MARCH 2007

C *Constitutional Law — Fundamental liberties — Equality before the law — Causing death by reckless or dangerous driving — Suspension of driving licence — Whether s 41(5) of the Road Transport Act 1987 violates or is contrary to the right to equal protection of the law in art 8(1) of the Federal Constitution — Doctrine of intelligible differentia — Road Transport Act 1987 ss 32, 35, 36, 41, 41(1), 41(5), 42 — Federal Constitution art 8(1) and 9(2)*

D

Road Traffic — Dangerous driving — Causing death by reckless or dangerous driving — Suspension of driving licence — Whether s 41(5) of the Road Transport Act 1987 violates or is contrary to the right to equal protection of the law in art 8(1) of the Federal Constitution — Road Transport Act 1987 ss 32, 35, 36, 41, 41(1), 41(5), 42 — Federal
E *Constitution arts 8(1) and 9(2)*

The respondent was charged before the magistrate court for the offence of causing death by reckless or dangerous driving. Pending his trial in the magistrate court, the
F respondent applied for a declaration that s 41(5) of the Road Transport Act 1987 ('the Act') is inconsistent with art 5(1) and art 8(1) of the Federal Constitution ('Constitution'); and an order that the Magistrate's order to suspend the respondent's driving licence be set aside. The respondent submitted that s 41(5) of the Act deprived him of his personal liberty and, denied him a fundamental right to be heard,
G inconsistent with and in violation of art 5(1) and art 8(1) of the Constitution respectively. It was contended that s 41(5) of the Act had offended against the doctrine of intelligible differentia which formed an integral part of art 8(1) of the Constitution and more specifically that death alone as a factor purportedly adopted by the Legislature to differentiate between the offences in ss 41 and 42 of the Act was purely arbitrary and unreasonable when viewed in relation to the social object sought
H to be achieved by the Act which was to protect third parties from risks and not death alone in the case of reckless and dangerous driving. The High Court granted the declaratory judgment and hence this appeal.

I **Held**, allowing the appeal:

(1) (per **Denis Ong JCA**) From the classification of offences in the case of *Reg v John Kenneth Guilfoyle* [1973] 57 Cr App R 549 and from the fixed demerit points assigned by the Minister of Transport in item 2 of the Schedule of the Act, the only reasonable conclusion of law to be drawn was that the offences

under ss 41 and 42 of the Act are treated alike, rated of equal severity and come under one and the same classification of offences (see para 31). A

(2) (per **Denis Ong JCA**) By way of construction and its meaning, s 41(5) of the Act applies specifically to a class of cases where the person is charged with an offence under s 41 and targets his driving licence by immediate and compulsory confiscation and its suspension by the court notwithstanding anything in any written law for the time being in force. It was obvious from the terms of s 41(5) of the Act that the person so charged has to attend court in person when the charge is first read to him and that be heard as to why his driving licence should not be confiscated and suspended immediately. The fundamental right to be heard before a decision is made by the magistrate on whether to confiscate and suspend a driving licence of the person charged with an offence under s 41(1) of the Act is not excluded by s 41(5) expressly or by necessary implication. Section 41(5) of the Act did not impinge upon, and was consistent with or in violation of the provisions of equality before the law in art 8(1) of the Constitution (see paras 35–37). B C D

(3) (per **Denis Ong JCA**) The provisions of s 32 of the Act are administered by the Director General of Road Transport who is empowered by specific provisions in ss 35, 35A, 36 of the Act and the provisions of ss 37 and 38 of the Act and of the rules made thereunder to suspend or revoke a driving licence having regard to the demerit points accumulated against a person as the driver of a motor vehicle, or his record as such driver kept by the Director General, or to his conduct or habits as such driver. The words 'suspended by virtue of this Part' in s 32(2) of the Act is not limited to a suspension following disqualification in s 32(1) of the Act but extends to obligatory suspension under ss 35, 36 and 41(5) of the Act, all of which are to be found in Part II of the Act under the subheading 'Licensing of Motor Drivers'. Sections 32, 35, 36 and 41(5) of the Act are thus inter-related. The governmental policy and purpose underlying suspension of the driving licence in these sections was declared in the text of s 35(1), (2) and (3) of the Act namely, 'it would not be in the interests of public safety for him (ie, the driver) to hold a valid driving licence or that such person is not competent to drive a motor vehicle' (see paras 38–39). E F G

(4) (per **Denis Ong JCA**) The legal consequence of confiscation and suspension under s 41(5) of the Act read with ss 32 and 38 of the Act is temporarily to stop the driver from driving a motor vehicle on the road under any other driving licence issued by any other authority or otherwise until his legal guilt with reference to the charge under s 41(1) of the Act is actually decided one way or the other by the court. By s 38(5) of the Act it is an offence if he drives a motor vehicle on a road when his driving licence is suspended. From the fact that s 41(5) of the Act is applicable specifically to the case of a person charged with an offence under s 41, (as distinct from an offender convicted as such) the suspension of the driving licence (as distinct from a disqualification order imposed upon an offender on conviction), its interim nature and legal consequence and the governmental policy and purpose of ss 35, 35A and 41 of the Act, it was inferred that the measure provided in s 41(5) of the Act was intended to be preventive in the interests of public safety and not a sentence H I

A passed upon a convicted offender. It is thus not punitive of the person charged with an offence under s 41of the Act (see para 41).

(5) (per **Denis Ong JCA**) From the fact that s 41(5) of the Act was applicable specifically to the case of a person charged with an offence under s 41(1) and has no application to the case of a person charged with an offence under s 42 B of the Act and taking into account that offences in ss 41 and 42 of the Act come under one and the same classification, it was logical to infer that s 41(5) of the Act created unequal or differential treatment between these persons in the same category that is to say, in favour of persons charged under s 42 of the Act by not suspending their driving licence thereby not stopping them from C continuing to drive a motor vehicle on the road pending judgment; and against persons charged under s 41(1) of the Act by suspending their driving licences thereby stopping them from continuing to drive pending the outcome of the charge under s 41(1). In that sense, s 41(5) of the Act was discriminatory between these persons charged under ss 41 and 42 of the Act (see para 42).

D (6) (per **Denis Ong JCA**) Freedom of movement on the road embodied in art 9(2) of the Constitution was expressly made subject to 'any law relating to … public order,' of which public safety is a part. The freedom of movement on the road is not absolute but is qualified by the overriding interests of public safety. Although s 41(5) of the Act is discriminatory, it was expressly allowed by the qualification in art 9(2) of the Constitution and also by judicial interpretation E of the meaning of 'public order' and 'public safety' and is good law according to the principle of law laid down by the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155. The classification in s 41(5) of the Act is permissible discrimination, consistent with art 9(2) of the Constitution, and does not violate and was not contrary to equality of F protection of the law in art 8(1) of the Constitution. Section 41(5) of the Act is constitutionally valid (see paras 46–47).

(7) (per **James Foong JCA**) The introduction of s 41 of the Act has set a scale to gauge the degree of recklessness and dangerous driving with mortality to a third party as a measure. This was the intelligible differentia which G distinguishes persons that are grouped together under s 41 of the Act from others that are excluded. It was not an artificial distinction. It was very real and substantive. It involves the intellectual comprehension of the differentia (see para 65).

(8) (per **James Foong JCA**) The objective of the Act was to offer protection to a H third party against risks arising out of the use of a motor vehicle. But the effect on an affected third party by such risks varies in degree and nature. The extreme is death. It is the belief that when a third party succumbs to death from a motor accident it must be caused by a high degree of recklessness and dangerous driving. This distinction may not be the best means to measure I gravity of recklessness and dangerous driving. This means of distinction was very much in the mind of the legislature when s 41(5) of the Act was introduced in Parliament. Parliament intended this provision to deter those who desire to drive recklessly and dangerously to a degree that causes death to a third party by suspending their driving licence immediately upon being charged to prevent a repeat of a similar incident. The differentia has a rational

relation or nexus with the objective sought to be achieved by the impugned law. When this discriminatory law is within a reasonable or permissible classification then it is an effective piece of legislation and consistent with art 8(1) of the Constitution (see para 66).

[Bahasa Malaysia summary

Responden telah dituduh di hadapan mahkamah majistret kerana kesalahan menyebabkan kematian dengan memandu secara melulu atau berbahaya. Sementara menunggu perbicaraan beliau di mahkamah majistret, responden telah memohon untuk satu deklarasi bahawa s 41(5) Akta Pengangkutan Jalan 1987 ('Akta tersebut') adalah tidak konsisten dengan perkara 5(1) dan perkara 8(1) Perlembagaan Persekutuan ('Perlembagaan tersebut'); dan satu perintah bahawa perintah majistret untuk menggantung lesen memandu responden diketepikan. Responden berhujah bahawa s 41(5) Akta tersebut menafikan kebebasan peribadi dan, dinafikan hak asasinya untuk didengar, tidak konsisten dengan dan bercanggah dengan perkara 5(1) dan perkara 8(1) Perlembagaan masing-masingnya. Adalah dihujahkan bahawa s 41(5) Akta tersebut telah melanggar doktrin intelligible differentia yang membentuk bahagian melengkapkan perkara 8(1) Perlembagaan tersebut dan lebih khusus kematian itu sendiri sebagai faktor yang dikatakan digunakan oleh badan penggubal untuk membezakan antara kesalahan-kesalahan dalam ss 41 dan 42 Akta tersebut adalah secara sewenang-wenang dan tidak munasabah apabila dilihat berkaitan dengan objek sosial yang ingin dicapai oleh Akta tersebut yang mana adalah untuk melindungi pihak-pihak ketiga daripada risiko-risiko dan bukan kematian itu sendiri dalam kes pemanduan melulu dan berbahaya. Mahkamah Tinggi telah membenarkan penghakiman perisytiharan dan rayuan ini dibuat.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Denis Ong HMR**) Berdasarkan klasifikasi kesalahan-kesalahan dalam kes *Reg v John Kenneth Guilfoyle* (1973) 57 Cr App R 549 dan berdasarkan poin-poin demerit tetap yang diberikan oleh Menteri Pengangkutan dalam item 2 kepada Jadual dalam Akta tersebut, satu-satunya kesimpulan undang-undang munasabah yang dibuat adalah bahawa kesalahan-kesalahan di bawah ss 44 dan 42 Akta tersebut dianggap sama, dinilai sama beratnya dan terangkum di bawah klasifikasi kesalahan yang satu dan sama (lihat perenggan 31).

(2) (oleh **Denis Ong HMR**) Melalui pembentukan dan maksudnya, s 41(5) Akta tersebut merujuk khususnya kepada satu kelas kes-kes di mana seseorang dituduh dengan satu kesalahan di bawah s 41 dan matlamatnya adalah untuk merampas dengan segera dan wajib lesen memandunya dan menggantungnya oleh mahkamah meskipun terdapat apa-apa undang-undang bertulis yang pada masa itu berkuatkuasa. Adalah nyata berdasarkan terma-terma s 41(5) Akta tersebut bahawa seseorang yang dituduh hendaklah menghadiri mahkamah secara perseorangan apabila pertuduhan itu dibaca pertama kali kepadanya dan bahawa beliau didengar terhadap sebab lesen memandu beliau tidak patut dirampas dan digantung serta merta. Hak asasi untuk didengar sebelum

keputusan dibuat oleh majistret berhubung sama ada untuk merampas dan menggantung lesen memandu seseorang yang dituduh kerana kesalahan di bawah s 41(1) Akta tersebut tidak dihalang oleh s 41(5) secara nyata atau tidak langsung. Seksyen 41(5) Akta tersebut tidak meninggalkan kesan ke atas, dan tidak konsisten dengan atau melanggar peruntukan hak saksama dari segi perundangan dalam perkara 8(1) Perlembagaan (liha perenggan 35–37).

(3) (oleh **Denis Ong HMR**) Peruntukan s 32 Akta tersebut dilaksanakan oleh Ketua Pengarah Pengangkutan Jalan Raya yang diberi kuasa oleh peruntukan spesifik dalam ss 35, 35A, 36 Akta tersebut dan peruntukan-peruntukan ss 37 dan 38 Akta tersebut dan kaedah-kaedah yang dibuat di bawahnya untuk menggantung atau membatalkan lesen memandu dengan mengambilkira poin-poin demerit yang dikumpul terhadap seseorang sebagai pemandu kenderaan bermotor, atau rekodnya sebagai pemandu sedemikian oleh Ketua Pengarah, atau terhadap kelakuan atau tabiatnya sebagai pemandu sedemikian. Perkataan-perkataan 'suspended by virtue of this Part' dalam s 32(2) Akta tersebut tidak terhad kepada penggantungan berikutan penyingkiran dalam s 32(1) Akta tersebut tetapi dilanjutkan kepada penggantungan wajib di bawah ss 35, 36 dan 41(5) Akta tersebut, kesemuanya yang terdapat dalam Bahagian II Akta tersebut di bawah tajuk kecil 'Licensing of Motor Drivers'. Seksyen-seksyen 32, 35, 36 dan 41(5) Akta tersebut oleh demikian adalah berhubung kait. Polisi dan tujuan kerajaan berhubung penggantungan lesen memandu dalam seksyen-seksyen berikut dibentangkan dalam teks s 35(1), (2) dan (3) Akta tersebut iaitu, 'it would not be in the interests of public safety for him (ie, the driver) to hold a valid driving licence or that such person is not competent to drive a motor vehicle' (lihat perenggan 38–39).

(4) (oleh **Denis Ong HMR**) Akibat perampasan dan penggantungan di sisi undang-undang di bawah s 41(5) Akta tersebut dibaca bersama ss 32 dan 38 Akta tersebut adalah menghentikan pemandu untuk sementara daripada memandu kenderaan bermotor di atas jalan raya di bawah mana-mana lesen memandu lain yang dikeluarkan oleh pihak berkuasa lain atau sebaliknya sehingga kebersalahan beliau di sisi undang-undang merujuk kepada pertuduhan di bawah s 41(1) Akta tersebut telahpun diputuskan salah satu atau sebaliknya oleh mahkamah. Melalui s 38(5) Akta tersebut ia adalah satu kesalahan jika beliau memandu kenderaan bermotor atas jalan raya apabila lesen memandunya digantung. Berdasarkan fakta bahawa s 41(5) Akta tersebut adalah terpakai khususnya terhadap kes di mana seseorang itu dituduh kerana kesalahan di bawah s 41, (yang berbeza daripada pesalah yang disabitkan sedemikian) penggantungan lesen memandu (yang berbeza daripada perintah penyingkiran yang dikenakan ke atas pesalah yang disabitkan), sifat sementaranya dan akibat di sisi undang-undang dan polisi kerajaan dan tujuan ss 35, 35A, dan 41 Akta tersebut, boleh dibuat inferens bahawa ukuran yang diperuntukkan dalam s 41(5) Akta tersebut bertujuan untuk bersifat pencegahan demi kepentingan keselamatan awam dan bukan satu hukuman yang diputuskan ke atas pesalah yang disabitkan. Oleh itu ia tidak membebankan seseorang yang dituduh kerana kesalahan di bawah s 41 Akta tersebut (lihat perenggan 41).

(5) (oleh **Denis Ong HMR**) Berdasarkan fakta bahawa s 41(5) Akta tersebut terpakai khususnya kepada kes seseorang yang dituduh kerana kesalahan di bawah s 41(2) dan tidak terpakai dalam kes di mana seseorang dituduh kerana kesalahan di bawah s 42 Akta tersebut dan mengambilkira bahawa kesalahan-kesalahan dalam ss 41 dan 42 Akta tersebut terangkum di bawah klasifikasi yang satu dan sama, ia adalah logik untuk membuat inferens bahawa s 41(5) Akta tersebut dibentuk secara tidak sama atau berbeza perlakuan antara mereka dalam kategori sama yang mana, menyebelahi mereka yang dituduh di bawah s 42 Akta tersebut dengan tidak menggantungkan lesen memandu mereka dengan itu tidak menghentikan mereka daripada terus memandu kenderaan bermotor atas jalan raya sementara menunggu penghakiman; dan terhadap mereka yang dituduh di bawah s 41(1) Akta tersebut dengan menggantung lesen memandu mereka dengan itu menghentikan mereka daripada terus memandu sementara menunggu keputusan pertuduhan di bawah s 41(1). Justeru itu, s 41(5) Akta tersebut adalah berdiskriminasi antara mereka yang dituduh di bawah ss 41 dan 42 Akta tersebut (lihat perenggan 42).

(6) (oleh **Denis Ong HMR**) Kebebasan bergerak atas jalan raya termaktub dalam perkara 9(2) Perlembagaan yang dengan nyata dibuat tertakluk kepada 'any law relating to … public order,' yang mana keselamatan awam adalah sebahagian daripadanya. Kebebasan bergerak atas jalan raya tidak mutlak tetapi bersyarat dengan kepentingan keselamatan awam yang diutamakan. Meskipun s 41(5) Akta tersebut berdiskriminasi, adalah jelas dibenarkan oleh syarat dalam perkara 9(2) Perlembagaan dan juga oleh pentafsiran kehakiman berhubung maksud 'public order' dan 'public safety' dan ia adalah undang-undang yang baik menurut prinsip undang-undang yang dinyatakan oleh Mahkamah Persekutuan dalam *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155. Klasifikasi dalam s 41(5) Akta tersebut adalah bersifat diskriminasi yang dibenarkan, konsisten dengan perkara 9(2) Perlembagaan, dan tidak melanggar dan tidak bercanggah dengan kesaksamaan perlindungan undang-undang dalam perkara 8(1) Perlembagaan. Seksyen 41(5) Akta tersebut adalah sah secara perlembagaannya (lihat perenggan 46–47).

(7) (oleh **James Foong HMR**) Pengenalan s 41 Akta tersebut telah meletakkan skala untuk mengukur tahap pemanduan melulu dan berbahaya sehingga menyebabkan kematian pihak ketiga sebagai ukuran. Ini adalah *intelligible differentia* yang membezakan seseorang yang dikumpulkan bersama di bawah s 41 Akta tersebut daripada yang lain yang dikecualikan. Ia bukan perbezaan buatan. Ia dalah yang sebenar dan substantif. Ia melibatkan pemahaman intelektual tentang perbezaan tersebut (lihat perenggan 65).

(8) (oleh **James Foong HMR**) Objektif Akta tersebut adalah untuk menawarkan perlindungan kepada pihak ketiga terhadap risiko-risiko yang timbul daripada penggunaan kenderaan bermotor. Namun kesan terhadap pihak ketiga yang terlibat dengan risiko-risiko yang berbeza dari segi tahap dan sifat. Yang ekstremnya ialah kematian. Adalah kepercayaan bahawa apabila pihak ketiga meninggal dunia akibat kemalangan motor ia hendaklah disebabkan oleh pemanduan yang mempunyai tahap melulu dan berbahaya yang tinggi. Perbezaan ini mungkin bukan sumber yang terbaik untuk mengukur

keseriusan pemanduan secara melulu dan berbahaya. Sumber perbezaan ini berada dalam pemikiran penggubal apabila s 41(5) Akta tersebut diperkenalkan di Parlimen. Parlimen berniat agar peruntukan ini mencegah sesiapa yang berhasrat untuk memandu secara melulu dan berbahaya sehingga tahap yang mengakibatkan kematian pihak ketiga dengan menggantung lesen memandu mereka dengan serta merta setelah dituduh untuk mengelak kejadian serupa berulang. Perbezaan tersebut mempunyai kaitan atau neksus yang rasional dengan objektif yang dipohon untuk dikecapi oleh undang-undang yang dipersoalkan. Apabila undang-undang berdiskriminasi ini terangkum dalam klasifikasi yang munasabah atau dibenarkan maka ia merupakan perundangan yang berkuat kuasa dan konsisten dengan perkara 8(1) Perlembagaan tersebut (lihat perenggan 66).]

Notes

For cases on causing death by reckless or dangerous driving see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 27–29.

For cases on equality before the law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1668–1784.

Cases referred to

Adnan Khamis v PP [1972] 1 MLJ 274 (refd)
Anwar Ali Sarkar's case [1952] AIR 75 (refd)
Chokolingo v AG Trinidad & Tobago [1981] 1 WLR 106 (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257 (folld)
Datuk Hj Harun Hj Idris v PP [1977] 2 MLJ 155 (folld)
Goh Kheng Seong v PP [1993] 1 MLJ 103 (refd)
Government of Malaysia & Ors v Loh Wai Kong [1979] 1 LNS 22; [1979] 2 MLJ 33 (refd)
Koh Chai Seng v PP [1981] 1 MLJ 64 (refd)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 72 (refd)
Pihak Berkuasa Negeri Sabah v Sugumar [2000] 3 MLJ 72 (refd)
PP v Su Liang Yu 1976] 2 MLJ 128 (refd)
R v Gosney [1971] 2 QB 674 (refd)
Ramiah v PP [1972] 2 MLJ 258 (refd)
Re Tan Boon Liat [1976] 2 MLJ 83 (folld)
Re Tan Boon Liat & Ors [1977] 2 MLJ 18 (refd)
Reg v John Kenneth Guilfoyle [1973] 57 Cr App R 549 (refd)
Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors AIR[1958] SC 538 (folld)
State of WB v Anwar Ali AIR [1952] SC 75 (refd)
Tan Thang Sang v PP [1975] 1 MLJ 204 (refd)

Legislation referred to

Federal Constitution arts 5(1), 8(1), 9(2)
Interpretation Act 1948 and 1967 s 3
Motor Vehicles (Construction and Use) Rules 1959 ss 70, 79, 105(2)
Motor Vehicles (Driving Licence) Rules 1992 r 15A

Police Act 1967 ss 21, 26, 29
Road Traffic Ordinance 1958 ss 32A(2), 32B, 32C, 34A(1)
Road Transport Act 1987 ss. 1(3), 17A, 35(1), (3), 35A(1), (2), (3), 36, 37, 38, 41(1), (5), 42, 44, 45, 66, 90(1), (2), 128

Appeal from: Originating Summons No 24–2828 of 2002 (High Court, Johor Bahru)

Alice YC Loke (Attorney General's Chambers) for the appellant.
Gobind Singh Deo (Karpal Singh & Co) for the respondent.

Denis Ong JCA:

INTRODUCTION

[1] This is an appeal by the Public Prosecutor (the appellant herein) from a declaratory judgment obtained by Harminderpall Singh a/l Jagara Singh (the respondent herein) which the High Court in Johore Baru handed down on 15 September 2004.

FACTS AND BACKGROUND

[2] The respondent was on 5 December 2002 charged before the Magistrate Court in Johore Baru in Criminal Case No. C83-109-2002 and the charge, in the national language, in the Charge Sheet, read thus:

> Bahawa kamu pada 30 April 2001 jam lebih kurang 0945 hours semasa memandu sebuah m/lori nombor pendaftaran JFY 5271 di Jalan Emas, Simpang Jalan Tembaga/Jalan Besi, Pasir Gudang daerah Johor Bahru dalam Negeri Johor Darul Takzim telah menyebabkan kemalangan jalanraya seterusnya menyebabkan kematian terhadap Mahadi bin Rajam, KP 650226-01-5681 yang beralamat di Kampung Tanjung Langsat, Masai, Johor. Dengan ini kamu telah melakukan satu kesalahan di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 (Pindaan 1999) dan boleh dihukum di bawah seksyen yang sama.

[3] According to the charge sheet, the respondent's driving licence class B was recorded to have been suspended by the court from 5 December 2002, the date of first mention until the conclusion of the trial. Further proceeding was adjourned to 13 February 2003 and the respondent was released on bail in the sum of RM5,000 and one surety.

[4] Pending his trial in the Magistrate Court, the respondent applied by way of originating summons No.24-2828-2002 dated 20 December 2002 to the High Court in Johore Baru seeking the following reliefs:

(a) a declaration that s 41(5) of the Road Transport Act 1987 (Act 333) is inconsistent with:

    (i) art 5(1); and

(ii) art 8(1)
of the Federal Constitution; and

(b) an order that the Magistrate's order to suspend the respondent's driving licence be set aside.

[5] The summons was heard initially on 18 August 2003, continued on diverse dates and the hearing concluded on 29 July 2004. Judgment was reserved. On 15 September, 2004 the Court handed down its decision which ordered in terms of the reliefs applied for and at the same time gave its grounds of judgment in writing. (see the entry in the notes of proceedings at the last line of page 86 of Appeal Record and also a copy of the Court Order dated 15 September 2004 at page 2 of the Supplementary Appeal Record). There seems to be a slip up in such entry and in the copy order. On a fair reading of the grounds of judgment in writing at pp 12 to 31 of the appeal record which are reported in [2005] 2 MLJ 542 it is plain that the learned High Court Judge is inconclusive on the merits of the submission of the respondent on the issue of whether s 41(5) is inconsistent with Art 5(1), and he made no holding one way or the other and accordingly made no such order/declaration in terms of relief (a)(i) applied for.

[6] On 23 September, 2004, the appellant filed a Notice of Appeal to the Court of Appeal against the whole of the decision of the High Court.

[7] On 1 October 2004, upon the application of the appellant, the High Court ordered a stay of its orders made on 15 September 2004 until the decision of the Court of Appeal.

[8] We heard this appeal on 5 January 2006 and reserved judgment and had on 1 December 2006 allowed the appeal, set aside all orders of the High Court and reinstated the order of the Magistrate. The following are our grounds for doing so.

IN THE HIGH COURT

[9] The challenge at first instance was on the constitutionality of s 41(5) of Act 333 vis-à-vis art 5(1) and art 8(1) respectively of the Federal Constitution. The respondent submitted that s 41(5):

(i) deprived him of his personal liberty; and

(ii) denied him a fundamental right to be heard
inconsistent with and in violation of art 5(1) and art 8(1) respectively.

[10] Applying the observations of the Federal Court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 at p.34, on the meaning of personal liberty in art 5(1) and again in *Pihak Berkuasa Negeri Sabah v Sugumar* [2000] 3 MLJ 72 (F.C.) at p.101, which meaning did not extend to the right of livelihood, and in the absence of specific, clear and unambiguous particulars in the affidavit pertaining to the allegation of deprivation of personal liberty, and applying the 7th proposition of law enumerated in *PP v Su Liang Yu* [1976] 2 MLJ 128 (HC) at page 131 left hand

column H-I, the High Court found that the respondent had not discharged the burden upon him to show that s 41(5) was unconstitutional in the sense that it transgressed the constitutional principles in art 5(1).

[11] On the submission in (2) above, the High Court found for the respondent that he was denied the privilege of being heard before his driving licence was suspended by the Magistrate Court under s 41(5) as a result of being charged under s 41 and he was so charged because of the death of the third party although the respondent should have been treated on an equal footing as those drivers charged for an offence under s 42 whose driving licences were not suspended pending trial as there was no provision in s 42 corresponding to s 41(5) and consequently no question of deprivation of his privilege to be heard.

[12] The High Court reasoned that reckless and dangerous drivers under s 41 and s 42 are similarly situated arising from driving under similar circumstances and should come under one classification and treated equally. The fact that death is caused to a third party is not a reasonable factor and is arbitrary to justify differential treatment in favour of drivers under s 42 who are not subject to suspension of their driving licences pending trial and against drivers under s 41 whose driving licences are subject to such suspension under s 41(5). Consequently, the Court held that s 41(5) is inconsistent with art 8(1). The reasons for the holding of the court on the issue raised by the submission in (2) above appear from paras 15 to 45 of [2005] 2 MLJ 542 at p.549 et seq, relevant extracts whereof are reproduced hereafter for easy reference:

> [15] I shall now turn to address the central issue on whether the right to be heard is a fundamental right guaranteed under art 8(1) of the Federal Constitution and if so, whether s 41(5) of the RTA which denied such a right to be heard is inconsistent with and in violation of art 8(1) of the Federal Constitution.
>
> [16], [17], [18] …
>
> [19] The equality protection through the doctrine of reasonable classification is, I must emphasize the only method of determining whether a law applied alike to all persons who are similarly circumstanced.
>
> [20] The doctrine of classification has been judicially accepted as an integral part of the equal protection clause as decided in the case of Malaysian Bar & Anor where Salleh Abas LP at p 166 stated:
>
> > The requirement for equal protection of the law does not mean that all laws passed by a legislative must apply universally to all persons and that the laws so passed cannot create differences as to the person to whom they apply and the territorial limits within which they are in force … Since the legislation can create the differences the question is whether these differences are constitutional. The answer is this, if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause.
>
> [21] The manner of ascertaining whether a classification is reasonable or otherwise was succinctly explained by Suffian LP in the celebrated case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* where at pp 165–166 he stated:

A In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is not, the law is void.

In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in Shri Ram Krishna Dalmia & Ors vs Shri Justice SR Tendolkar & Ors AIR 1958 SC 538, provided that:

(i) the classification is founded on an intelligible differentia which distinguished persons that grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[22] Where therefore the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law there will be no violation of art 8(1) (see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64). Thus if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and therefore, there is no discrimination amongst equals (see *Charanjit Lal Chowdbury v Union of India* AIR 1951 SC 41). A law would be regarded as discriminatory only if it discriminates one person or class of persons against others similarly situated and denies to the former the privileges that is enjoyed by the latter (see *State of WB v Anwar Ali* AIR 1952 SC 75). As stated in *Lindsley v National Carbonic Gas Co* (1911) 220 US 61 it is only when a law is without any reasonable basis can it be termed as arbitrary.

[23] …

[24] In approaching the question of infringement of art 8 and the application of the two tier test to determine reasonable classification it is imperative that policy underlying the statute which purports to infringe the equality provision and the object intended to be achieved by the statute concerned has to be ascertained – *Basu's Commentary on the Constitution of India* (6th Ed, Vol B) p 171.

[25] The objective of the law is ascertainable from the preamble of the Road Transport Act 1987 which says it is an Act to make provision for, amongst others:

the protection of third parties against risks arising out of the use of motor vehicles.

[26] Having ascertained the policy and object of the Act the court must now apply the two tier test of whether the provision of s 41(5) of RTA falls under the doctrine of reasonable classification as laid down by Hashim Yeop A Sani J in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 at p 133:

The settled law now is that for the test of permissible classification to be satisfied, two conditions must be fulfilled namely: (1) the classification must be founded on intelligible

differentia which distinguishes person or things that are grouped together from others left out of the group; and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

[27] Thus it is settled law that art 8(1) of the Federal Constitution does permit reasonable classification if and only if it is founded on intelligible differentiation having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[28] Hence the question which has to be asked by the court is:

(i) whether or not the classification is based on an intelligible differentia which distinguishes persons that are grouped together from persons left out of the group; and

(ii) whether the differentia has a rational relation to the object sought to be achieved by the law in question.

[29] In addressing the question aforesaid it must be reiterated that where the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law that there will be no violation of art 8(1) (per Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64).

[30] In addressing the first question learned federal counsel Alice Loke submitted that the differentia in s 41(5) is that the mandatory suspension of licence only operates against those charged under the said provision due to the gravity of the offence charged and hence the classification was founded on an intelligible differentia by the legislature to address the particular concern.

[31] On the second question the learned federal counsel submitted that the rational relation between the differentia and the object or nexus sought to be achieved lies in the fact that it is in the public interest or in the legitimate government's ultimate interest that the road is managed and regulated in an orderly manner to ensure safety of road users and their protection from irresponsible drivers causing death by reckless or dangerous driving.

[32] In the context of the RTA it cannot be disputed that the classification of persons who drive recklessly or dangerously are classified into a separate class, for whom provisions are made under s 41 and s 42 of the RTA…

42 Reckless and dangerous driving …

[33] A close scrutiny of ss 41 and 42 of the RTA would reveal that the only difference between the two sections lies in the factum of death resulting to third parties as a result of such driving.

[34] Under s 41 of the RTA where death arises, sub-s (5) provides for immediate confiscation of the driving licence pending trial whereas such a provision does not appear in s 42 of the RTA.

[35] It follows therefore, in my view that s 41 of the RTA stands to provide for a class of its own and may be regarded as classification in its own right and the question thus arises whether there is intelligible differentia justifying such a classification bearing in mind that the differentia must have a rational relation to the object sought to be achieved by the RTA.

[36] My response would be to answer it in the negative.

[37] To my mind if the purpose or object of the Act, as set out in the preamble is to make provision for the protection of third parties against risks arising out of the use of motor vehicles, then why are those persons accused of careless driving in which serous injuries or even injuries alone/and or occurring to third parties not subjected to suspension pending trial as well?

A [38] It is obvious that the sting of the object or social object sought to be achieved by the Act is to protect third parties against 'risks' (ie all risks) culminating from those who drive recklessly or dangerously. What is the rationale then for discriminating against those in whose case (sometimes, if not almost always, unfortunately) a third party dies but not where the third party is seriously injured?

B [39] Hence the invariable conclusion that the factor which the legislature adopted as constituting the dissimilarity in circumstances between s 41 and s 42 (ie death alone) becomes purely arbitrary and unreasonable in relation to the social object sought to be achieved by the Act which, as stated above, is to protect third parties from risks and not death alone in the case of reckless and dangerous driving.

C [40] It cannot be denied that persons charged under s 42 of the RTA include those who drive recklessly and dangerously and cause serious risk and injury to third parties but unfortunately or rather fortunately these people, who form the very group from which the Act intends to protect third parties, are not discriminated against and subjected to a deprivation of a right to be heard before their licences are suspended.

[41] Surely such a classification cannot be based on intelligible differentia and would offend the equality provision of art 8(1) of the Federal Constitution?

D [42] As was stated by Augustine Paul JCA in *Danaharta*'s case at p 42:

> A law would be regarded as discriminatory only if it discriminates one person or class of persons against other similarly situated and denies to the former the privileges that are enjoyed by the latter (see *State of WB v Anwar Ali* AIR 1952 SC 75).

E [43] This reference provides of a classic example of a situation where one class of persons who are similarly situated namely those who drive dangerously and recklessly, but the applicant being in a category within the class is denied the privilege of being heard, before his licence is suspended because of the factum of death of the third party whereas those who drive dangerously and recklessly but do not cause death by so doing do not suffer the same fate. This, to my mind, is unreasonable and is of no relation to the actual object sought to be achieved by the RTA. In the circumstances it is the courts' duty to guard the constitution, jealously if I may add, and strike down such provision which is discriminatory in nature.

F [44] As Justice Ajaib Singh said in *Ong Ah Chua*'s case: If any particular piece of legislation gives so much as a hint that it violates the constitution, the court must unhesitatingly declare it null and void and of no effect. On the other hand if the impugned legislation is not inconsistent with or does not in any way violate the constitution, it is equally the duty of the court to uphold its validity and give effect to it.

G [45] For the foregoing reasons the application herein is allowed with costs.)

IN THE COURT OF APPEAL

H **[13]** Although the notice of appeal at p 10 of the Appeal Record stated that the High Court allowed the respondent's application for a declaration that s 41(5) of Act 333 was inconsistent with art 5(1) and art 8(1) of the Federal Constitution and that the present appeal was against the whole decision, all the grounds of appeal in the Memorandum of Appeal and the appellant's skeletal submission were against the declaration of the High Court that s 41(5) was inconsistent with art 8(1) only. There was no mention whatever of art 5(1).

I **[14]** At the outset of the hearing before us, Alice Loke, learned senior federal counsel ('the SFC') for the appellant, made an oral statement to the Court that the

High Court in fact held that s 41(5) was not unconstitutional vis-à-vis art 5(1), the obverse of what was stated in the Notice of Appeal. And so it was recorded. We regarded her statement from the Bar as a corrigendum of what was mistakenly stated in such notice of appeal. There was no dispute by Mr. Gobind Singh Deo of learned counsel ('counsel') for the respondent. Consequently, whether s 41(5) was inconsistent with art 5(1) was no longer an issue in this appeal and we heard nothing more on that aspect from either side.

[15] The sole question for determination in this appeal before us is whether s 41(5) violates/is contrary to the right to equal protection of the law in art 8(1) of the Federal Constitution. The challenge in the High Court as earlier stated was that s 41(5) deprived the respondent of a fundamental right to be heard which was guaranteed under art 5(1). The main argument of the respondent advanced there as a means to that end was that s 41(5) offended against the doctrine of intelligible differentia which formed an integral part of art 8(1) and more specifically that death alone as a factor purportedly adopted by the Legislature to differentiate between the offences in s 41 and s 42 was purely arbitrary and unreasonable when viewed in relation to the social object sought to be achieved by Act 333 which was to protect third parties from risks and not death alone in the case of reckless and dangerous driving. The High Court decided in favour of the respondent and against the appellant on that argument (see paras 39, 40 and 41of the High Court judgment above quoted). The appellant's appeal to the Court of Appeal was against that decision. The appellant disputed the classification by the High Court that s 41 and s 42 dealt with the same offences and therefore should come under one classification and further disputed that the death factor was not an intelligible differentia for a valid distinction between the two offences. Hence the arguments on these matters before us.

SUBMISSION OF THE SFC

[16] On the law and in anticipation of the arguments of counsel, the SFC submitted thus:

(a) art 8 embodies the rule against discrimination;

(b) That persons similarly situated must be subjected to the same law and cited *Danaharta Urus Sdn Bhd v Kekatong Sdn. Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 (FC) at p 274 para 36 per Augustine Paul JCA;

(c) that discriminatory laws per se does not offend art 8(1). The doctrine of reasonable classification was an integral part of art 8(1) and cited Danaharta Urus at page 274 para 37;

(d) to ascertain whether a classification is reasonable is to examine whether the classification is founded on an intelligible differentia and that this differentia has a rational relation to the object of Act 333 and cited Danaharta Urus at page 274 paras 36 and 37;

(e) Ss 41 and 42 of Act 333 are offences creating sections relating to reckless or dangerous driving with a distinction that s 41 creates an offence of reckless or dangerous driving which results in death and s 42 which does not result in the death of a member of the public;

(f) a person charged under s 41 is not in the same category as a person charged under s 42 because under s 41 the reckless or dangerous driving results in death but not so in the case under s 42;

(g) death is a factor which distinguishes s 41 from s 42 and hence a heavier penalty in s 41 which relates to the object of Act 333;

(h) suspension of the driving licence is not a penalty, it is a consequence not provided for in s 42;

(i) s 41(5) is inserted by the Road Transport (Amendment) Act 1999 (Act A 1065/99) with effect from 18 April 2000 and the reason for the amendment is because of an increase in fatal road accidents causing serious financial implications and cited *Hansard* Dewan Rakyat — Bacaan Kali Kedua dan Ketiga;

(j) the preamble to Act 333 declares that the object of Act 333 is to protect third parties against the risks arising out of the use of motor vehicles. It is therefore evident that s 41(5) bears a reasonable relation to that object as persons charged with reckless or dangerous driving causing death will be subject to suspension of the driving licence;

(k) the complaint of the respondent was that by being charged under s 41 and not under s 42 he was being discriminated against. The basis of the argument of the respondent was that the offences in ss 41 and 42 are similar offences ie dangerous and reckless driving and thus should be treated alike, being in the same category or similarly circumstanced By charging him under s 41 and his driving licence suspended under s 41(5), the respondent complained that he was discriminated against whereas if he were charged under s 42, his driving licence would not have been suspended;

(l) there was no basis for the complaint of discrimination against the respondent charged under s 41. The respondent was not similarly circumstanced as a person charged under s 42 for unlike the latter, the reckless or dangerous driving of the respondent resulted in death. The categories of persons to whom ss 42 and 41 apply are easily distinguishable;

(m) Whilst the High Court recognized that the respondent was not similarly circumstanced as a person charged under s 42, it erred in concluding that the difference was purely arbitrary and unreasonable. The point here was that death was a serious consequence and to have the driving licence of the respondent suspended under s 41(5) could not be said to be unreasonable. In short, the respondent could not complain that he had received unequal treatment if he compared himself with someone who was charged under s 42 because it was no comparison. Circumstances in s 41 and s 42 are not the same.

[17] In the premises the SFC submitted that there was no denial of equal protection of the law with regard to the respondent. His contention that s 41(5) was legislated in violation of art 8(1) was thus baseless and devoid of merit and lastly that this appeal be allowed with cost.

SUBMISSION OF COUNSEL

[18] For the respondent, counsel made the following points:

(i) one of the objects of Act 333 stated in the long title is to make provision for the protection of third parties against risks arising out of the use of motor vehicles;

(ii) both ss 41 and 42 deal with persons who drive recklessly and/or dangerously;

(iii) however, a person charged under s 42 is not subject to suspension of his driving licence at the time he is charged. Unlike a s 41 offence, a person charged under s 42 still has a right to drive pending trial, but not a person charged under s 41 whose driving licence is suspended pending trial. If convicted, under s 41(3) and s 42(3) both offenders are disqualified from holding or obtaining a driving licence for certain specified period;

(iv) ss 41 and 42 provide for a class of persons who drive recklessly or dangerously and for mandatory disqualification from driving upon conviction which is in line with the object of Act 333 namely, to make provision for the protection of third parties against risks arising out of the use of motor vehicles;

(v) the issue here is if both persons charged under s 41 and s 42 were classified as persons who drive recklessly or dangerously, what is the intelligible differentia which justifies a person charged under s 42 who is also one who drives dangerously and/or recklessly, to continue driving until a conviction against him is recorded? Why discriminate against a person charged under s 41 whilst both are allegedly drivers whose driving is dangerous and/or reckless?;

(vi) his conclusion was that s 41(5) is unconstitutional as it offends art 8(1) because of such discrimination when both drivers are classified under the same heading of dangerous and/or reckless drivers;

(vii) equality before the law and equal protection of the law requires that like should be compared with like. It assures to the individual the right to equal treatment with other individuals in similar circumstances. There must be a subjection to equal laws applying alike to all persons in the same situation – that is the protection assured by art 8(1);

(viii) A law would be regarded as discriminatory only if it discriminates one person or a class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter: *State of WB v Anwar Ali* AIR 1952 SC 75 approved by the Federal Court in *Danaharta*;

(ix) s 41(5) denies the accused person the privilege of driving pending his trial but affords such privilege to a person charged under s 42 although both s 41 and s 42 deal with reckless and/or dangerous driving and provide for punishments of equal severity i.e. disqualification from driving in the event of a conviction;

(x) the factum of death as a result of an accident alone does not make a driver more reckless or dangerous than another. An accident occurs as a result of reckless and/or dangerous driving. There is no intention to cause death. It is unfortunate if a person dies but it would be worse if he were so severely injured and left practically dead but not dead as a result of dangerous and/or reckless driving. Yet s 42 provides the offenders with a licence to continue driving pending his trial. For if he were found guilty later, he would be punished with disqualification. The point made here is that a person charged under s 42 who is a person equally classified as one who drives recklessly and/or dangerously is entitled to the privilege of driving pending trial.

[19] In the premises, Counsel submitted that s 41(5) is discriminatory and is liable to be struck down as being unconstitutional, that the orders of the High Court are correct and that this appeal be dismissed with costs.

CLASSIFICATION OF ROAD TRAFFIC OFFENCES

(i) Under Guilfoyle's case

[20] A classification of road traffic offences, offenders and the principles of sentencing was laid down in *Reg v John Kenneth Guilfoyle* (1973) 57 Cr App R 549 (CA) per Lawton LJ at p 552:

> Cases of this kind fall in to two broad categories: first, those in which the accident has arisen through momentary inattention or misjudgment, and, secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.
>
> Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users.
>
> In the judgment of this Court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from driving or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course, there are special reasons for not disqualifying. If his driving record is indifferent, the period of disqualification should be longer, say two to four years, and, if it is bad, he should be put off the road for a long time.
>
> For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, custodial sentence with a long period of disqualification may well be appropriate, and, if this kind of driving is coupled with a bad driving record, the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.

[21] It is a fact that the guidelines pertaining to the classification of road traffic offences, offenders and sentencing laid down in *Guilfoyle* has been accepted and

followed in practice only in Peninsular Malaysia initially. This fact is recorded in the judgment of Ong CJ in *Tan Thang Sang v Public Prosecutor* [1975] 1 MLJ 204 at p 208 left-hand column I:

> I trust therefore that the guidelines laid down in *Regina v Guilfoyle* (9) which I have recently caused to be circulated to all subordinate courts will be studied and followed.

(see also *Goh Kheng Seong v Public Prosecutor* [1993] 1 MLJ 103 (HC Penang)

[22] Latterly, with the application throughout Malaysia of a uniform Act 333 (see s 1(3) with effect from 1 January 1988 (PU(B) 694/87) it must be taken that the guidelines in *Guilfoyle* now applies throughout Malaysia.

(ii) Under Demerit Points System

[23] The classification by countries of road traffic offences according to the severity of such offences is by way of the point system. In the USA it is called the 'Point' System and in England, the 'Penalty Points'. In Malaysia it is known as the demerit points system. According to *Black's Law Dictionary* (7th Ed) (1999) at p 1177, the point system is 'a system that assigns incremental units to traffic violations, the accumulation of a certain number within a year resulting in the automatic suspension of a person's driving privileges' and according to *Dobbs & Lucraft — Road Traffic Law And Practice* (1993) at p 182 para A14-09:

> … The aim of the system was to try and discriminate between offences of differing severity by 'attaching' to offences a number of points that would be endorsed on the driver's licence. Under the previous system, all endorsements counted equally whatever the offence …

[24] The demerit points system was first introduced in Malaysia via the Road Traffic (Amendment) Act 1983 (Act A563/83) with effect from 15 May 1983 which inserted s 32A, s 32B and s 32C into the Road Traffic Ordinance (FM Ord 49/1958).

[25] Details of the implementation of the demerit points system were set out in the Road Traffic (Demerit Points) Rules 1984 (PU(A)28/84 with effect from 1 February 1984) made by the Federal Minister of Transport in exercise of the powers conferred upon him by Parliament in s 32A(2). FM Ord 49/1958 was, in so far as it did not relate to the licensing of commercial vehicles, repealed by Act 333 with effect from 1 January 1987 (PU(B) 694/87). PU(A) 28/84 being a subsidiary legislation made under FM Ord 49/1958 was expressly saved from repeal and deemed by the proviso to s 128 of Act 333 to have been made under s 66 of that Act and continued to remain in force until revoked by the Motor Vehicles (Demerit Points) Rules 1995 (PU(A)452/1995) which came into force on 30 December 1995. PU(A) 452/1995 was in turn revoked by the Motor Vehicles (Demerit Points) Rules 1997 (PU(A) 79/97 which are currently in force with effect from 1 March 1997.

[26] 'Demerit' is nowhere defined in Act 333 or in PU(A)79/97. According to the *Concise Oxford Dictionary* (9th Ed) 'demerit' means '1. a quality or action deserving blame; a fault. 2. N. Amer. a mark awarded against an offender.' The legal principle underlying the Motor Vehicles Demerit Points system is the fault principle which

attributes fault or blame to the offender as a driver of a motor vehicle for a failure, that is to say, for falling below the standard of care or skill of a competent and experienced driver, in relation to the manner of driving and to the amount of traffic (actual or expected) on the road. As Megaw L. J says in *R v Gosney* [1971] 2 QB 674 (CA) at p 680A-D:

> We would state briefly what in our judgment the law was and is on this question of fault in the offence of driving in a dangerous manner.
>
> It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure, a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation.

[27] The fault principle set out in *Gosney* has been applied in Malaysia by the Federal Court in *Adnan Bin Khamis v Public Prosecutor* [1972] 1 MLJ 274 at p 278D per Ong CJ; *Tan Thang Sang v Public Prosecutor* [1975] 1 MLJ 204 and p 205 right hand column C–D per Ong C.J. and by the High Court in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 at p 259 left hand column C and right hand column A per Raja Azlan Shah J (as he then was).

[28] As previously stated, the Demerit Points system was first introduced in Malaysia by Act A568/83 via s 32A thereof (now s 35 of Act 333). The Explanatory Note to the Bill to Act A563/83 stated that the implementation of a points system for the commission of offences by drivers of motor vehicles was 'so as to instill in them a greater sense of road safety awareness in view of the rising number of accidents in recent years'. The Note explained that the introduction of the new ss 32A, 32B and 32C (now ss 35, 37 and 38 of Act 333) was to give the Director-General power to suspend a driving licence of any person, for a period not exceeding six months (now not exceeding twelve months under s 35(1) of Act 333), where it was established that it would not be in the interests of public safety for the person to hold a driving licence or that such person was not competent to drive a motor vehicle and further that details of the implementation of the points system were to be set out under rules to be made by the Minister.

[29] Having regard to the dictionary meaning of 'demerit' and an idea of how the Point system works in practice, it is apparent that the purpose of the system was to instruct drivers of motor vehicles to have a better capacity for safe behaviour on the road especially in the movement of traffic — in short, public safety on the road, or road sense as it is known in Britain. That purpose of public safety can be achieved by drivers observing the Highway Code, the provisions of Act 333, the Traffic Signs

(Size, Colour and Type) Rules 1959 (FLN 167/59), the Road Traffic Rules 1959 (FLN 166/59), the Motor Vehicles (Construction and Use) Rules 1959 (FLN170/50) and the Motor Vehicles (Driving Licence) Rules 1992 (PU(A)409/92) as they are amended from time to time, without violations or breaches thereof which otherwise, would constitute offences listed as 'scheduled offences' in the Schedule to PU(A)79/97 and for which demerit points would accumulate against such drivers and consequential suspension of their driving licences. Emphasis on observances of the road traffic law is to bring home to drivers a sense of public order and public safety on the road, that their driving of motor vehicles on the road is a privilege (and not a right) regulated by valid driving licences having been issued to the drivers and their vehicles licensed, tested for their fitness and competency to drive on the road and for the road-worthiness of their vehicles. In addition, a person is compulsorily required by s 90(1) of Act 333 to take out third party insurances and to keep them on foot against risks to life and limb of passengers they carry in such vehicles and other members of the public on the road arising from a person or class of persons' use of such vehicles on the road. s 90(2) of Act 333 makes it a criminal offence to use or to cause or permit to use, a motor vehicle on the road without one. Failure to observe the road traffic law entails disqualification of the drivers and their driving licences suspended, cancelled or revoked for specified periods.

[30] The demerit points to be awarded in the column against the numbered items are indicative of the relative severity of the scheduled offences. Thus, a fixed demerit point of 15 which is the maximum under the Demerit Points Rules 1997 (see s 35(3) of Act 333) is to be awarded against a driver convicted of an offence under ss 44, 45, 45A, 41, 42, 43, 81 and sub-s 45B(4) or 45C(6) of Act 333 in items 1, 2, 3, 4 and 5 of the Schedule thereto, and a fixed demerit point of 5 which is the minimum is to be awarded against a driver convicted of an offence under sub-s 70(4), s 79, sub-r 105(2) of the Motor Vehicles (Construction and Use) Rules 1959 (FLN 170/59), para 12(3)(a) of the Traffic Signs (Size, Colour and Type) Rules 1959 (FLN 167/59) and r 15A of the Motor Vehicles (Driving Licence) Rules 1992 (PU(A)409/92) in items 14, 15, 16, 17 and 18 of the same Schedule.

OFFENCES IN ss 41 AND 42 — UNDER ONE SAME CLASSIFICATION

[31] From the classification of offences in *Guilfoyle* and from the fixed demerit points assigned by the Executive via the Federal Minister of Transport in item 2 of the Schedule, the only reasonable conclusion of law to be drawn is that the offences under s 41 and s 42 of Act 333 are treated alike, rated of equal severity and come under one and the same classification of offences. At this juncture, it is fitting that I express acceptance of the submission of counsel on the classification of offences in ss 41 and 42 but not his reasons therefor; and with respect, rejection of the submission of the SFC on the same point. And after the maximum demerit points of 15 has been reached, suspension by the Director General of the driving licence becomes obligatory under s 35(4) after notice in writing to show cause under rule 7(1) of PU(A) 79/97 has been issued to the driver concerned and he failed to respond.

[32] Sections 41, 42 and 32 read thus:

A Causing death by reckless or dangerous driving

41. (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of
B an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

C (3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than three years from the date of conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of conviction.

(3A) Notwithstanding subsection (1), where a person who is a holder of a probationary
D driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

(4) The court may upon the trial of a person for an offence under this section convict such person of an offence under section 42 or 43.

(5) Notwithstanding anything in any written law for the time being in force, the court
E before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect:

(a) until the court makes a final decision on the charge; and

F (b) as if the suspension is the suspension referred to in section 32.

(5A) If the driving licence of the person referred to in subsection (5) is incorporated in a multipurpose electronic card or device, the order of the court under that subsection shall be deemed to have been complied with if the particulars of the order are included in the database maintained by or on behalf of the Director General of driving licences granted
G under this Act and holders of such driving licences.

referred to in subsection (5) to surrender, within such period as the Director may specify, the multipurpose electronic card or device in which the driving licence is incorporated to him, or to a road transport officer authorized in writing in that behalf by the Director General, for the inclusion in the data stored in the card or device the particulars of the order of the court made under subsection (5) and the Director or such authorized officer shall,
H after such inclusion, immediately return the card or device to the person.

Reckless and dangerous driving

42. (1) Any person who drives a motor vehicle on a read recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and
I size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding five years and to a fine of not less than five thousand ringgit and not more than fifteen thousand ringgit and, in the case of a second or subsequent conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than ten thousand ringgit and not more than twenty thousand ringgit.

(2) the court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than two years from the date of conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of conviction;

(4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.'

32. (1) Where a person who is disqualified by virtue of a conviction or order is the holder of a driving licence, such driving licence shall be suspended as long as the disqualification continues in force.

(2) A driving licence suspended by virtue of this Part shall during the time of suspension be of no effect.

a driving licence applies for or obtains a driving licence while he is so disqualified, or if any such person while he is so disqualified drives a motor vehicle or, if the disqualification is limited to the driving of a motor vehicle of a particular class or description, drives a motor vehicle of that class or description, that person shall be guilty of an offence and shall on conviction be liable –

(a) to imprisonment for a term not exceeding one year; or

(b) to a fine not exceeding five thousand ringgit if the court thinks that having regard to the special circumstances of the case it is not necessary to impose a sentence of imprisonment for the offence.

(4) A driving licence obtained by such person disqualified as aforesaid shall be of no effect.

(5) For the purposes of this section, reference to a conviction or order shall include a reference to a conviction or order under this Part and to any conviction or order under the provisions of any corresponding written law in the Republic of Singapore'

[33] The origin of s 41(1) of Act 333 is traced back to s 34A(1) of the Road Traffic Ordinance 1958 (FM 49 of 1958) being first inserted into the Ordinance by the Road Traffic (Amendment) Act 1964 (Act of Parliament No.13/1964). Paragraph 3 of the Explanatory Statement to the Bill to that Act states:

3. At present prosecution in respect of deaths resulting from the use of motor vehicles has always been instituted under s 304A of the Penal Code and while this is satisfactory, specific provisions should be made in the legislation dealing with motor vehicles for such an offence; and this has now been provided in Clause 3.

[34] With the enactment of s 34A of FM 49 of 1958), the Federal Court in *Adnan bin Khamis v Public Prosecutor* [1972] 1 MLJ 274 observed at p 278, per Ong CJ:

Needless to say, in the case of fatal road accidents, s 304A of the Penal Code seems to have been rendered practically redundant by s 34A of the Road Traffic Ordinance 1958. We can hardly imagine any circumstances in which a charge under section 304A may be resorted to by choice in preference to a charge under s 34A of the Ordinance. Similarly s 279 of the Penal Code must be regarded as obsolescent, if not a dead letter, except for riders of horses.

A sub-s (5) was inserted into s 41 by the Road Transport (Amendment) Act 1999 (Act A 1065/99) and came into operation on 18 April 2000 (PU(B) 94/2000).

SECTION 41(5) — CONSTRUCTION AND MEANING

B **[35]** By way of construction and its meaning, s 41(5) applies specifically to a class of cases where the person is charged with an offence under s 41 and targets his driving licence by immediate and compulsory confiscation and its suspension by the court notwithstanding anything in any written law for the time being in force. The words 'such suspension shall have effect as if the suspension is the suspension referred to in C section 32' in s 41(5)(b) refer to the suspension of the driving licence by the court and also to the suspension of the driving licence by the Director General under ss 35 and 36 and by such phrase namely, 'as if the suspension is …' in s 41(5)(b), a device of referential legislation, treats as or deems a driving licence suspended by the court to be the same as one suspended by the Director General under ss 35 and 36 (see s 41(5A) in force from 28 April 2005 PU(B)156/2005) and of no effect during D the time of suspension as provided in s 32(2) of Act 333. But unlike the suspension by the Director General, s 41(5)(a) prescribes when the duration of the confiscation and suspension by the court is to start and lapse. s 41(5)(a) is a specific provision to empower the court to order suspension of the driving licence of the driver from the date of first reading of the charge under s 41(1) to the final decision on the charge, E obviously referring to the mention and trial period in the magistrate's court until it pronounces its decision to discharge, acquit or to convict the accused person of the charge as the case may be, signifying clearly that the suspension is intended to be an interim measure only and 'specific' because the exercise of the court's power to order immediate confiscation and suspension of the driving licence is limited specifically to the case of a person charged with an offence under s 41(1). The opening phrase of F s 41(5) namely, 'Notwithstanding anything in any written law for the time being in force' gives the specific provision of s 41(5) overriding authority over other provisions in any written law as the interpretation and meaning of 'written law' is defined in s 3 of the Interpretation Acts 1948 and 1967 (Act 388) and which other provisions become operative before 18 April 2000 (see PU(B)94/2000) in the event of any G inconsistency in these other provisions with the specific provision in s 41(5) which genuinely cannot be reconciled by the rule of harmonious construction. The interpretation and meaning of 'written law' (as opposed to 'law') in s 3 of Act 388 does not include the rules of natural justice which undoubtedly apply to s 41(5). The rules of natural justice are Malaysian common law concepts (unwritten law) H declared by Malaysian courts in the exercise of their judicial power. They are not legislated by Parliament: *Chokolingo v AG Trinidad & Tobago* [1981] 1 WLR 106 (PC) at p 110H per Lord Diplock; see also *Ong Ah Chuan v Public Prosecutor* and *Koh Chai Seng v Public Prosecutor* [1981] 1 MLJ 64, at p 71 right hand column B–D.

SECTION 41(5) DOES NOT IMPINGE UPON EQUALITY PROVISION OF I ART 8(1)

[36] It is obvious from the terms of s 41(5) that the person so charged has to attend the court in person when the charge is first read to him and that he be heard as to why his driving licence should not be confiscated and suspended immediately. It may

very well be that the person so charged was at the steering wheel under urgent and compelling circumstances when no other means of transportation was available at the material time e.g. transporting a critically ill person from a rural area or a seriously injured and helpless victim of a road traffic accident to the Government or private hospital for emergency treatment.

[37] The fundamental right to be heard before a decision is made by the magistrate on whether to confiscate and suspend a driving licence of the person charged with an offence under s 41(1) is not excluded by s 41(5) expressly or by necessary implication. Section 41(5) does not impinge upon, is not inconsistent with or in violation of the provisions of equality before the law in art 8(1).

[38] The provisions of s 32 are administered by the Director General of Road Transport who is empowered by specific provisions in ss 35, 35A, 36, and the provisions of ss 37 and 38 of Act 333 and of the rules in PU(B)79/97 to suspend or revoke a driving licence having regard to the demerit points accumulated against a person as a driver of motor vehicle, or his record as such driver kept by the Director General, or to his conduct or habits as such driver. In this regard it is noteworthy that the words 'suspended by virtue of this Part' in s 32(2) is not limited to a suspension following disqualification in s 32(1) but extends to obligatory suspension under ss 35, 36 and 41(5), all of which are to be found in Part II of Act 333 under the subheading 'Licensing of Motor Drivers'.

Sections 32, 35, 36 and 41(5) — Interrelationship and Effect and art 9(2)

[39] Sections 32, 35, 36 and 41(5) are thus inter-related. The governmental policy and purpose underlying suspension of the driving licence in these sections is declared in the text of s 35(1)(2) and (3) namely, 'it would not be in the interests of public safety for him (ie the driver) to hold a valid driving licence or that such person is not competent to drive a motor vehicle'. The same text is repeated in s 35A(1)(2) and (3) also in Part II which share the same policy and purpose. 'public safety' (the purpose) is part of the wider concept of public order and maintenance of public order is equated with the maintenance of public tranquility. The meaning of the expression 'public safety' is nowhere defined in Act 333. Ordinarily, 'public safety' means security of the public or their freedom from danger: see *Re Tan Boon Liat* [1976] 2 MLJ 83 (HC) at p 86 right hand column D–F per Abdoolcader J: see also *Re Tan Boon Liat & Ors* [1977] 2 MLJ 18 (FC) at p19 right hand column E per Suffian LP.

[40] Used with reference to Act 333, 'public order' concerns the maintenance of traffic law and order on the road in the exercise by the public of their freedom of movement in Art 9 of the Federal Constitution.

[41] The legal consequence of confiscation and suspension under s 41(5) read with s 32 and s 38 is temporarily to stop the driver from driving a motor vehicle on the road under any other driving licence issued by any other authority or otherwise until his legal guilt with reference to the charge under s 41(1) is actually decided one way or the other by the court. And by s 38(5) it is an offence if he drives a motor vehicle on a road when his driving licence is suspended. From the fact that sub-s (5) is

applicable specifically to the case of a person charged with an offence under s 41, (as distinct from an offender convicted as such) the suspension of the driving licence (as distinct from a disqualification order imposed upon an offender on conviction), its interim nature and legal consequence and the governmental policy and purpose of ss 35, 35A and 41 alluded to earlier, it is inferred that the measure provided in s 41(5) is intended to be preventive in the interests of public safety and not a sentence passed upon a convicted offender as SFC submitted. It is thus not punitive of the person charged with an offence under s 41 as counsel submitted.

[42] From the fact that sub-s (5) is applicable specifically to the case of a person charged with an offence under s 41(1) and has no application to the case of a person charged with an offence under s 42 and taking into account that offences in ss 41 and 42 come under one and the same classification, it is logical to infer as counsel rightly so inferred that sub-s (5) creates unequal or differential treatment between these persons in the same category that is to say, in favour of persons charged under s 42 by not suspending their driving licence thereby not stopping them from continuing to drive a motor vehicle on the road pending judgment; and against persons charged under s 41(1) by suspending their driving licences thereby stopping them from continuing to drive pending the outcome of the charge under s 41(1). In that sense s 41(5) is discriminatory between these persons charged under ss 41 and 42.

Whether s 41(5) violates/is contrary to the right to equal protection of the law in art 8(1)

[43] The principles of law and approach to determine the validity of s 41(5) are set out in the judgment of that Federal Court in the leading case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 at pp 165–166 per Suffian LP more specifically, the sith, 7th, 8th, 9th and 11th principles:

> 6 With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the Constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.
>
> 7 In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia* (7) provided that:
>
> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.
>
> The Solicitor-General submits that if the doctrine is to be accepted by our courts,…, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be

left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what was said in paragraph 6 above.

… As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8 Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself, or it may be inferred from the objects and reasons of the bill, the preamble and the surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law … We think we should follow the same principle.

9 In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy (Per Sastri C.J. in Anwar Ali (2)).

11 Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J. in Chhagganlal (10).

[44] Having regard to the legal inference that s 41(5) is discriminatory, the issue of law not to be missed here (as has been missed in the submissions of both sides before the High Court and before us) and which is to be approached firstly, as set out by Suffian LP in the sixth principle of *Harun Haji Idris* quoted above, is whether or not s 41(5) is allowed by art 9 of the Federal Constitution or by judicial interpretation. If it is allowed, then it is good law. If it is not allowed, then s 41(5) is void. Secondly, discriminatory law is also good law if the classification is based on the doctrine of intelligible differentia i.e. 'reasonable' or 'permissible' classification which is accepted by our courts. This second approach in the seventh principle of *Harun Haji Idris* is resorted to e.g. where there is nothing in the Federal Constitution or case law expressly allowing or disallowing the discriminatory law. It will then be the task of the court to consider the reasonableness or permissibility of the classification in the discriminatory law. As Suffian LP said expressly, this second approach is subject to the first.

[45] Applying the ordinary meaning of 'public safety' accepted in *Re Tan Boon Liat & Ors* (HC and FC) to the legislative contexts in ss 35, 35A and 36, 'public safety' means the security of the public or their freedom from danger to life and limb (ie risks of loss of life and risks of bodily injury) in the exercise of their freedom of movement on the road; in other words, the welfare and protection of the general public on the road (see also the meaning of 'public safety' in *Black's Law Dictionary* at p 1245) which are rightly the concern of Parliament to address under the subject matter of 'public order' as judicially interpreted in *Re Tan Boon Liat* (HC and FC)

and eminently within its legislative competence to enact: see Federal Constitution, 9th Schedule List I — Federal List, items 10(d) and 3(a) … 'public order', as it has indeed done so by these sections, the function of the court to give effect to the will of Parliament therein expressed (see s 17A of Act 388) and the duty of the Police to enforce: see ss 21, 26, and 29 of the Police Act 1967 (Act 344).

[46] Freedom of movement on the road embodied in art 9(2) is expressly made subject to 'any law relating to … public order,' of which public safety is a part. Putting it in another way, the freedom of movement on the road is not absolute but is qualified by the overriding interests of public safety.

[47] Thus, the answer to the issue of law above in my opinion is that although s 41(5) is discriminatory, it is expressly allowed by the qualification in art 9(2) of the Federal Constitution and also by judicial interpretation of the meaning of 'public order' and 'public safety' and is good law according to the sixth principle of law laid down by the Federal Court in *Harun Haji Idris*. In short, the classification in s 41(5) is permissible discrimination, consistent with art 9(2), does not violate and is not contrary to equality of protection of the law in art 8(1). Section 41(5) is constitutionally valid. And I hold accordingly.

[48] The second approach referred to above does not arise and is unnecessary to consider in this appeal.

CONCLUSION

[49] For the reasons stated, the appeal is allowed with costs. All orders of the High Court are set aside and the order of the learned magistrate on the suspension of the respondent's driving licence be restored. Ordered accordingly.

Mohd Ghazali JCA:

[50] I have had the benefit of reading the grounds of judgment in draft of my learned brothers Denis Ong and James Foong JJCA in this appeal and respectfully express my concurrence with the reasons stated therein for our unanimous decision pronounced in open court on 1 December 2006.

James Foong JCA:

INTRODUCTION

[51] The respondent was charged in the Magistrate Court, Johor Bahru with an offence against s 41(1) of the Road Transport Act 1987 ('RTA'). This section reads:

Causing death by reckless or dangerous driving

41. (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than three years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

(3A) Notwithstanding subsection (I), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

(4) The court may upon the trial of a person for an offence under this section convict such person of an offence under section 42 or section 43.

(5) Notwithstanding anything in any written law for the time being in force, the court before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect...

(a) until the court makes a final decision on the charge; and

(b) as if the suspension is the suspension referred to in section 32.

[52] Upon being charged, the magistrate ordered the immediate suspension of his driving licence pursuant to s 41(5) RTA. This move prompted the respondent to file, on 20 December 2002, an originating summons in the Johor Bahru High Court for the following reliefs:

(i) a declaration that s 41(5) of the Road Transport Act 1987 is inconsistent with art 5(1) and art 8(1) of the Federal Constitution; and

(ii) the magistrate's order to suspend the respondent's license be set aside.

[53] The originating summons was heard by Justice Syed Ahmad Helmy who on 15 September 2004 allowed the respondent's application and ordered the lifting of the suspension order on the respondent's driving licence. As this decision has far reaching consequences to a large portion of the general public, the appellant immediately filed this appeal and obtained from the court below a stay of this decision.

[54] Since the respondent only succeeded in his application based on violation of art 8(1) of the Federal Constitution and not art 5(1) both parties agreed that for this appeal the only issue is:

Whether s 41(5) RTA violates or is contrary to art 8(1) of the Federal Constitution?

[55] It is the contention of the respondent that he is discriminated against equal protection of the law guaranteed by Article 8 of the Federal Constitution in this manner: If an accused is charged for reckless and dangerous driving under s 42 RTA his driving licence would not be suspended. However if he is charged under s 41, also for reckless and dangerous driving, then his licence would be immediately suspended pursuant to s 41(5) RTA. Since the essence of the acts specified in both ss 41 and 42 is the same, ie reckless and dangerous driving, then discrimination arise when one is subjected to have his licence suspended upon being charged whilst the other does not suffer the same fate.

[56] In determining this issue, it is necessary to set out s 42 RTA in full before 1 begin to discuss the issue at hand.

> Reckless and dangerous driving
>
> 42. (1) Any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding five years and to a fine of not. less than five thousand ringgit and not more than fifteen thousand ringgit and, in the case of a second or subsequent conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than ten thousand ringgit and not more than twenty thousand ringgit.
>
> (2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.
>
> (3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than two years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.
>
> (4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

THE LAW ON DISCRIMINATION

[57] The law regarding infringement of art 8 of the Federal Constitution is well established and is comprehensively set out by Augustine Paul JCA (as he then was) in the Federal Court case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 at p 273.

[58] To begin with, equal protection of the law does not mean that all laws passed by the legislature must apply universally to all persons. The impugned lawcan create differences as to the persons to whom it is to be applied and to the territorial limits within which it is to be enforced. Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 72 explains this in this fashion:

> Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) (our Article 8(1)) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances.

[59] Another illustration can be found in *Willis' Constitutional Law* (1st Ed) at p 578 (which is adopted by the Federal Court in both *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 and *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165 at p 168):

> The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate, 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & in the liabilities imposed. 'The inhibition of the amendment... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis. Mathematical nicety & perfect equality are not required. Similarly, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis.

[60] Since the validity of a law relating to equals is to be tested against 'like to like', a doctrine of classification emerged. Seervai on *Constitutional Law of India* (4th Ed), Vol 1 at p 439 (and accepted in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* elaborates this as follows:

> What is meant by the 'equal protection of the law'? We must answer that question. If all men were created, equal, and remained equal throughout their lives, then the same laws would apply to all men. But we know that men are unequal; consequently, a right conferred on persons that they shall not be denied 'the equal protection of the laws' cannot mean the protection of the same laws for all. It is here that the doctrine of classification... steps in, and gives content and significance to the guarantee of the equal protection of the laws... A law based on a permissible classification fulfils the guarantee of the equal protection of the laws and is valid; a law based on an impermissible classification violates that guarantee and is void.

[61] Therefore a discriminatory piece of law is good law if is based on 'reasonable' or 'permissible' classification — see Suffian LP in *Datuk Haji Harun bin Hj Idris v*

Public Prosecutor. But what are the criteria for this reasonable or permissible classification? On this, SR Das CJ in the Indian case of *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538 (and adopted in *Danaharta Urns Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* disclosed:

> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to he achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[62] Going by the *Oxford English Dictionary*, 'intelligible' means: capable of understanding (not by senses) that may be apprehended by intellect, and 'differentia'1 means: the attribute by which a species is distinguished from all other species of the same genus; a distinguishing mark or character. In this instance, the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may therefore be founded on a different basis, namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. The classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made would be without any reasonable basis — Mukherjee J in *Anwar All Sarkar's case* 1952 AIR 75 and quoted in *Public Prosecutor v Su Liang KM* [1976] 2 MLJ 128 at p 130.

THE RATIONAL OF THE TRIAL JUDGE

[63] Accepting that the only difference between ss 41 and 42 RTA lies in the death factor the learned trial judge said:

> It follows therefore, in my view that s 41 of RTA stands to provide for a class of its own and may be regarded as classification in its own right and the question thus arises whether there is intelligible differentia justifying such a classification bearing in mind that the differentia must have a rational relation to the object sought to be achieved by the RTA.
>
> My response would be to answer it in the negative.

Then he proceeded to give his reasons as follows:

> To my mind if the purpose or object of the Act, as set out in the preamble is to make provision for the protection of third parties against risks arising out of the use of motor vehicles, then why are those persons accused of careless driving in which serious injuries or even injuries alone/and or occurring to third parties not subjected to suspension pending trial as well?
>
> It is obvious that the sting of the object or social object sought to be achieved by the Act is to protect third parties against 'risks' (ie all risks) culminating from those who drive

recklessly or dangerously. What is the rationale then for discriminating against those in whose case (sometimes, if not almost always, unfortunately) a third party dies but not where the third party is seriously injured?

Hence the invariable conclusion that the factor which the legislature adopted as constituting the dissimilarity in circumstances between s 41 and s 42 (ie death alone) becomes purely arbitrary and unreasonable in relation to the social object sought to be achieved by the Act which, as stated above, is to protect third parties from risks and not death alone in the case of reckless and dangerous driving.

It cannot be denied that persons charged under s 42 of the RTA include those who drive recklessly and dangerously and cause serious risk and injury to third parties but unfortunately or rather fortunately these people, who form the very group from which the Act intends to protect third parties, are not discriminated against and subjected to a depravation of a right to be heard before their licenses are suspended.

Surely such a classification cannot be based on intelligible differentia and would offend the equality provision of art 8(1) of the Federal Constitution?

Then he concluded in this fashion:

This reference provides of a classic example of a situation where one class of persons who are similarly situated namely those drive dangerously and recklessly, but the applicant being in a category within the class is denied the privilege of being heard, before his licence is suspended because of the factum of death of the third party whereas those who drive dangerously and recklessly but do not cause death by so doing do not suffer the same fate. This, to my mind, is unreasonable and is of no relation to the actual object sought to be achieved by the RTA, In the circumstances it is the courts' duty to guard the Constitution, jealously if I may add, and strike down such provision which is discriminatory in nature.

ARGUMENT OF THE PROSECUTION

[64] Federal Counsel, Ms Alice Loke, arguing for the appellant stressed that though the trial judge is correct in setting out the legal principles governing this area of the law as well as accepting that s 41 RTA caters for a class of its own he is wrong to conclude that there is no permissible classification to render s 41(5) RTA valid in law.

ANALYSIS

[65] It is not in dispute that the trial judge has highlighted that the material difference between ss 41 and 42 RTA is the death factor. I agree that other than this, and the sentencing provision, the wordings in these two sections are virtually identical; both concerns driving a motor vehicle recklessly and dangerously. So if a driver of a motor vehicle is charged under s 41 RTA and the other under s 42 RTA they would be both accused of driving their motor vehicles recklessly and dangerously. The only difference is that in the case of the driver charged under s 41 RTA, where death to third party has occurred, his driving licence would be immediately suspended upon being charged whereas his counterpart, who is charge

under s 42 RTA suffers no such impediment since death has not occurred to a third party. I think the purpose of using this death factor to differentiate the situation is to measure the degree of recklessness and dangerous driving. The introduction of s 41 RTA has set a scale to gauge the degree of recklessness and dangerous driving with mortality to a third party as a measure. This, to my mind, is the intelligible differentia which distinguishes persons that are grouped together under s 41 RTA from others that are excluded. It is not an artificial distinction. In fact it is very real and substantive. It involves the intellectual comprehension of the differentia as discussed. Thus, on this point, I agree with the trial judge's finding that the first condition in this instant case of whether the classification is permissible has been satisfied.

[66] The next condition to be fulfilled is whether the differentia has a rational relation or nexus with the object sought to be achieved by the impugned law. There is no doubt that the objective of the entire RTA is meant to offer protection to third party against risks arising out of the use of motor vehicle. This is set out in the preamble of RTA. But the effect on an affected third party by such risks varies in degree and nature. The extreme is death. It is the belief that when a third party succumbs to death from a motor accident it must be caused by a high degree of recklessness and dangerous driving. This distinction may not be the best means to measure gravity of recklessness and dangerous driving as revealed by the example given by Mr Gobind Singh Deo, counsel for the respondent, who said that a victim of reckless and dangerous driving may be paralyzed; an injury worse than death. There may be some truth in this but this is debatable. In any event, unless there is another more accurate and suitable means to evaluate the degree of recklessness and dangerous driving this standard of using the death factor is still the more determining and rational mode of measurement. This means of distinction was very much in the mind of the legislature when s 41(5) RTA was introduced in Parliament. The *Hansard*'s report on the parliamentary debates of 13 and 26 July 1999 disclosed that Parliament intended this provision to deter those who desire to drive recklessly and dangerously to a degree that causes death to a third party by suspending their driving licence immediately upon being charged to prevent a repeat of a similar incident. From this angle, I am of the view that the differentia has a rational relation or nexus with the objective sought to be achieved by the impugned law, When this discriminatory law is within a reasonable or permissible classification then it is an effective piece of legislation and not inconsistent with art 8(1) of the Federal Constitution.

CONCLUSION

[67] For reasons aforesaid, I find that the trial judge has erred in his views as expressed. This appeal is allowed with costs. The orders of the trial judge set aside.

The order of the learned magistrate on the suspension of the respondent's driving licence restored.

Appeal allowed.

Reported by Peter Ling